United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Original with Affidavit of Mailing

75-1052

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1052

UNITED STATES OF AMERICA,

Appellant,

—v.—

TOMMY ROBERTS,

Appellee.

PETITION FOR REHEARING OR REHEARING *EN BANC*

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ALVIN A. SCHALL,
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PRELIMINARY STATEMENT

The UNITED STATES OF AMERICA, by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing or, in the alternative, for rehearing en banc of the judgment of a panel entered April 9, 1975, which affirmed an order of the United States District Court for the Eastern District of New York (John F. Dooling, J.) dismissing indictment 73 Cr 884 against appellee TOMMY ROBERTS. The petition for rehearing en banc is filed pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure, which provides that, although such petitions are not favored, they are appropriate "when consideration by the full court is necessary to secure or maintain uniformity of its decisions or when the proceeding involves a question of exceptional importance."

STATEMENT OF FACTS

Following his arrest on May 25, 1973, appellee was indicted on October 2, 1973 and charged with ten counts of unlawful possession of stolen mail, in violation of Title 18, United States Code, Section 1708. At the time of appellee's arraignment, on October 15, 1973, when he pleaded not guilty, it was agreed with the United States Attorney's Office that in return for his cooperation against Alonzo and Henry Smith, two brothers who were defendants in related cases, appellee would be permitted to plead guilty to a superseding misdemeanor information, in lieu of standing trial on felony indictment 73 Cr 884. Appellee was advised, however, that his plea could only be taken after the Government had completed its prosecution of the Smiths. Appellee agreed and stated that he would cooperate. On October 23, 1973, the Government filed its Notice of Readiness for Trial, as required under Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases.

Both appellee's case and those of the Smiths were assigned to Judge Anthony J. Travia. As a result, because of Judge Travia's involvement, until July of 1974, in the case

of United States v. Bernstein, et al., 72 CR 587,[1] and his subsequent extended vacation and resignation from the federal bench, no action was taken in appellee's case or in either Smith case until November 13, 1974. On that day, appellee's case was called by Judge Dooling, to whom it had been reassigned following Judge Travia's resignation. It was at this time that appellee raised, for the first time, the claim that he had been denied his Sixth Amendment right to a speedy trial.

Subsequently, on January 20, 1975, Judge Dooling dismissed the indictment, finding that appellee had been denied his speedy trial right, because the passage of time- appellee had become 26 on May 21, 1974- had prejudiced him by rendering him ineligible for sentencing under the Youth Corrections Act as a young adult offender. Title 18, United States Code, Sections 4209, 5010(a) and 5021.[2]

The Government promptly appealed Judge Dooling's order. On April 9, 1975, a panel of this Court (Circuit Judges Smith and Timbers and District Judge Bryan [3]) affirmed the ruling of the District Court, Judge Timbers dissenting. (Slip op. 2795). On May 5, 1975, Judge Bryan filed the

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1/ Appeal filed, 74-2328, et al.

2/ On February 14, 1975, the Smith cases were disposed of by plea.

3/ Frederick vP. Bryan, of the Southern District of New York, sitting by designation.

following concurring opinion in the case:

> I concur in affirming the order appealed from on the ground that, under the highly unusual circumstances of this case, the dismissal of the indictment by the District Court was a proper exercise of judicial discretion. (Slip op. 2809).

REASONS FOR GRANTING THE
PETITION FOR REHEARING

1. As Judge Timbers correctly recognizes in his dissent, the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), "made it very clear that 'the ... remedy of dismissal of the indictment' was not intended to reward a defendant who has failed to assert his right to a speedy trial." (Slip op. 2805). The majority in this case, however, contrary to this admonition, has granted dismissal of the indictment to a defendant: (i) who never intended to go to trial; (ii) who was represented by counsel throughout; (iii) who had entered into an open and fair agreement with the Government as to the disposition of his case - an agreement which the Government even now stands ready to honor; and (iv) who at no time until it was too late raised his speedy trial claim. As Judge Timbers states, "[t]his is surely a most inappropriate case in which to invoke the unsatisfactorily severe remedy of dismissal of the indictment." (Slip op. 2809).

Furthermore, the decision of the panel in this case is totally inconsistent with the judgment of this Court, rendered only the day before, in United States v. Roemer, _____F. 2d _____, Slip op. 2773 (2d Cir. April 8, 1975). In Roemer, this Court, in rejecting the speedy trial claim of a

defendant who allegedly wanted a trial but had not asserted his claim, stated, at Slip op. 2784:

> The defendant obviously could have tried to hasten his day in court by asking for it. He chose not to do so, however, in hopes of catching the government in a violation of statutory or constitutional norms. As Barker v. Wingo makes eminently clear, a defendant follows such a course at almost certain detriment to his cause.4/

In addition to being inconsistent with United States v. Roemer and Barker v. Wingo, however, Judge Smith's opinion is also based on at least several faulty premises.

4/ Judge Smith seeks to mininize the fact that appellee did not assert his claim by saying that appellee was almost certainly ignorant "of the implications of delay beyond his 26th birthday." (Slip op. 2804). Such an approach, however, ignores the fact that appellee was at all times represented by counsel in the person of the Legal Aid Society. Moreover, such an approach places appellee, who at all times has conceded his guilt, in a better position, so far as the speedy trial clause, than the Smiths who were desirous of a trial. See Roemer, supra; United States v. Drummond, ____ F.2d ___, Slip op. 1781 (2d Cir. February 11, 1975). It also would lead to the anomaly that, if say, there were a fourth accomplice who had entered into the same agreement with the United States Attorney's Office as had appellee, and who was either still under 26 in 1975, or, alternatively, beyond 26 when he was indicted, then he would still face prosecution while appellee went free. The same anomaly would develop in a trial context. Thus one could hardly imagine dismissing the indictment against one of the Smiths simply because he was younger than his confederate. In sum, we submit in this regard that the prejudice contemplated by the speedy trial clause must be related to the fact finding process. As such, at a minimum, a trial must be anticipated in order for the clause to apply at all. (See Brief for Appellant, pp. 6-7).

To begin with, the opinion fails to balance against the prejudice claimed by appellee the fact that he gained, through his agreement with the Government, the decided advantage of not having to stand trial on a ten count felony indictment. Secondly, the opinion attributes to the Government the "ability to predict with great certainly that Roberts would be seriously prejudiced in the event that he was not permitted to plead guilty prior to his 26th birthday." (Slip op. 2800). This statement gives no explanation as to how the Government came to possess this "ability." In addition, it carries with it the astounding implication that somehow it was the Government, and not the Legal Aid Society, who was responsible for appellee's interests. Viewed in any light, however, the statement ignores the salient fact that based upon its agreement with appellee, it was entirely proper for the United States Attorney's Office to believe that appellee's silence meant, at the least, that he was not dissatisfied with the terms of the disposition plan. In this respect, the delay in this case, which was, for the most part, during the period of appellee's cooperation when he remained silent, "was attributable to the defendant." United States v. Singleton, 460 F.2d 1148, 1151 (2d Cir. 1972), cert. denied 410 U.S. 984

(1973).[5] And finally, Judge Smith's argument concerning appellee's claimed prejudice is further belied by Judge Timbers' apt observation that often many defendants, including this one, may not truly desire Youth Corrections Act treatment. (Slip op. 2808-2809, n.1).[6]

A particularly disturbing aspect of Judge Smith's opinion, however, is found in the statement that the Government "plainly had an interest in tardy disposition of Roberts' case and played an important role in procuring the delay experienced by the defendant." (Slip op. 2802). Any suggestion, such as this, that the Government somehow acted improperly here is totally unwarranted by anything in the record and overlooks the facts of the case. At the very outset, in October

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5/ In Singleton, this Court held that a defendant who agrees to cooperate with the United States cannot use that period to buttress a speedy trial claim after he changes his mind and decides to stand trial. In effect, a period of cooperation is considered as a decision by a defendant to forego his right to a speedy trial. Thus, when a defendant cooperates with the Government and agrees to testify he is not merely failing to make a demand, rather, he is removing himself from any prosecutorial context which invokes policies underlying the speedy trial clause. Simply put, a defendant who agrees to testify and plead guilty may not also claim a right to a speedy trial.

6/ Indeed, it is by no means certain that appellee would have been sentenced under the Youth Corrections Act. "Young adult offenders" (i.e. those between 22 and 26) do not enjoy the same presumption in favor of Youth Corrections Act sentencing as their younger associates. See United States v. Kaylor, 491 F.2d 1133, 1137 (2d Cir. en banc), reversed on other grounds, ____U.S.____, 94 S.Ct. 320 (1974).

of 1973, the Government and appellee, who was represented by counsel, entered into an agreement for the disposition of appellee's case. Appellee was free to accept or reject the terms of this agreement, and he accepted them. Thereafter, the Government did nothing to either frustrate this agreement or deny appellee the speediest possible disposition of his case. On the contrary, the Government has at all times been ready to honor the plea bargain, while it is appellee who is now seeking to disavow it. It is unfair to blame the Government for the delay in disposing of appellee's case, simply because the terms of the disposition plan - a plan which appellee fully agreed to - required that appellee not enter his plea until the Smith prosecutions had been completed.7/ In fact, the immediate cause of the delay here was not the United States Attorney's Office but, rather, Judge Travia's involvement in the Bernstein case, a factor which has been rejected by this Court as a ground for an asserted denial of the speedy trial right. See Slip op.

7/ Judge Smith's opinion applies the Sixth Amendment's speedy trial clause to a change of plea from not guilty to guilty. However, even if appellee had pled guilty prior to May 21, 1974, the Government could properly have sought to insure his continued cooperation by requesting adjournments of his sentencing until after he had testified against the Smiths. The effect of any such adjournment past May 21, 1974, it is submitted, would have been to deny appellee Youth Corrections Act treatment. Under T. 18, U.S.C., Section 4209 a "young adult offender" is a defendant who has not reached his 26th birthday at the time of his "conviction." (Emphasis added). Although some courts would grant Youth Corrections Act treatment to defendants under 26 at the time of a plea of guilty, the language of the statute clearly runs counter to such an approach, and this Court has not given a definitive ruling on the point. See United States v. Schwarz, 500 F.2d 1350, 1352 n.4 (2d Cir. 1974).

2808, n. 3, and United States v. Drummond, supra.

In addition to being in conflict with United States v. Roemer and Barker v. Wingo, however, the holding in this case has been further undermined by the filing of Judge Bryan's concurring opinion. Judge Bryan's opinion, which is presumably under the authority of Rule 48(b) of the Federal Rules of Criminal Procedure, has the effect of creating a conflict within the panel itself. Thus, as the case now stands, the order of the District Court has been affirmed by a majority represented by Judge Smith's opinion -- already discussed above -- and Judge Bryan's concurrence. Judge Bryan's concurrence, however, is based on grounds not considered by the District Court and specifically rejected by both Judge Smith (Slip op. 2798, n. 3) and Judge Timbers (Slip op. 2806, n. 1). The decision of the panel in this case is thus both internally inconsistent and also in conflict with the law of this Circuit. One can scarely imagine a situation more urgently requiring the attention of the full court. For this reason alone, the petition for rehearing en banc should clearly be granted.

2. Another equally compelling reason exists for granting the petition for rehearing en banc.

In Santobello v. New York, 404 U.S. 257 (1971); at 260, the Supreme Court (Chief Justice Burger) stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

The effect of the decision in this case, however, is to strike down a good faith plea agreement entered into by the Government and a cooperating defendant, who was at all times represented by counsel. As demonstrated above, this result is totally unjustified by the facts of the case. Moreover, the judgment of the panel is completely inconsistent with the fair and equitable administration of criminal justice. The Government, of course, has been frustrated in its legitimate prosecution of a serious crime. Most importantly, though, a panel of this Court has awarded the benefits of the Sixth Amendment speedy trial right to Tommy Roberts, a defendant who, as part of an advantageous plea bargain, had agreed to plead guilty, had no intention of going to trial and who never asserted his claim. At the same time, neither Martin Roemer nor Dennis Drummond, each of whom contested the charges against him and demanded his day in court, has had

his indictment dismissed. Clearly, such a result comports with neither logic nor fairness. More seriously, it will have the effect of undermining the relationship between the United States Attorney and defendants who have decided to cooperate and testify against others who have committed crimes.8/

CONCLUSION

THE PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR REHEARING EN BANC SHOULD BE GRANTED. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENT SHOULD BE REINSTATED.

Dated: Brooklyn, New York
May 23, 1975

Respectfully submitted,

DAVID G. TRAGER
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ALVIN A. SCHALL,
Assistant United States Attorneys,
(Of Counsel)

8/ We do not think it idle speculation to suppose that many cases which are built essentially upon the grand jury testimony of co-operating defendants would not to be triable because the main witness, on the eve of trial, suddenly asserted his "right" to a speedy trial.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23rd day of May 19 75 he served ~~a copy~~ two copies of the within

Petition for Rehearing or Rehearing En Banc

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
~~Federal Defender Services Unit~~
509 United States Courthouse
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
23rd day of May 19 75

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. [illegible]3480350
[illegible]s County
Commission Expires March 30, 1977